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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 569

VINCENZO IANNELLA AND FRANK S. RUSSO,
Appellants,

vs.

ARVID JOHNSON, RECORDER OF THE TOWNSHIP OF PISCATAWAY, AND THE TOWNSHIP OF PISCATAWAY, A MUNICIPAL CORPORATION OF NEW JERSEY

ON APPEAL FROM SUPREME COURT OF NEW JERSEY, FORMERLY THE COURT OF ERRORS AND APPEALS OF NEW JERSEY

STATEMENT AS TO JURISDICTION

Your petitioners-appellants in the above entitled action respectfully show that this appeal is a proper subject matter and within the jurisdiction of the Supreme Court of the United States because it involves the determination of the question of whether or not the Zoning Ordinance of the Township of Piscataway, Middlesex County, New Jersey, in so far as it prohibits throughout the entire Township of Piscataway the lawful business of slaughtering of animals, is violative of the fourteenth amendment to the Constitution of the United States in that it deprives your petitioners-

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appellants of their property without due process of law, and denies to your appellants the equal protection of law, since your appellants are the owners and had been operating a slaughterhouse in the Township of Piscataway until the appellees proceeded to enforce this provision in said ordinance and preferred charges against appellants for violations of said ordinance.

This appeal is being prosecuted in accordance with Title 28, of the United States Code, Chapter 81, Section 1257, and its subsections, wherein an appeal is allowable where the highest court of a State has declared valid a statute, or ordinance, wherein it was charged that said statute or ordinance violated any federal law or the federal constitution. This question is in this appeal. If it be determined that the opinion of the Court of Errors and Appeals of New Jersey, now the Supreme Court of New Jersey, did not in itself determine the validity or the invalidity of the zoning ordinance in question because its opinion stated that your petitioners were precluded from raising this constitutional question in the Recorder's Court of the Township of Piscataway since your petitioners did not appeal from or otherwise review the determination of the Board of Adjustment of the Township of Piscataway on August 1, 1946, within thirty days thereafter as required by statute, N. J. S. A. 40:55-46, yet under Title 28, Chapter 81, Section 1257 (3) there was drawn in question in this litigation throughout and before the Court of Errors and Appeals of New Jersey, the validity of the zoning ordinance as being repugnant to the fourteenth amendment to the Constitution of the United States. Whether the review by the Supreme Court of the United States should be by appeal or writ of certiorari is immaterial since Title 28, Chapter 133, Section 2103, provides in effect that if the remedy is by appeal, and a writ of certiorari is allowed and this remedy pursued, or

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vice versa, the review will be permitted and the papers treated and conformed to the proper and appropriate remedy.

The judgment of the Court of Errors and Appeals of New Jersey, now the Supreme Court of New Jersey, in holding that your petitioners were precluded from questioning the constitutionality of the zoning ordinance as being violative of the fourteenth amendment to the Constitution of the United States in the Recorder's Court of the Township of Piscataway, because your petitioners failed to appeal from or otherwise review the determination of the Board of Adjustment of the Township of Piscataway on August 1, 1946, wherein the Board dismissed the application of your petitioners for a one year extension of the permit to operate their slaughterhouse, although concededly the Board of Adjustment on August 1, 1946, and at all other times, was without jurisdiction in the matter because your petitioners did not give any five days prior written notice of the time and place appointed by the Board of Adjustment for hearing on said application as required by N. J. S. A. 40:55-44, and which has been determined to be a jurisdictional requirement, plus the further fact that both by statute and decisions of the Courts of the State of New Jersey the Board of Adjustment was wholly without jurisdiction to entertain and decide the question of the constitutionality of said zoning ordinance and its alleged repugnancy to the fourteenth amendment to the Constitution of the United States, in itself and by such a determination violated the fourteenth amendment to the Constittuion of the United States because in so doing it precluded your petitioners from their attacking the constitutionality of the zoning ordinance due to a determination of the Board of Adjustment which latter determination was a nullity since the Board of Adjustment had neither jurisdiction over the persons or

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subject matter in the cause where petitioners sought to obtain a year's extension of the permit to operate the slaughterhouse.

The pertinent provisions of the zoning ordinance of the Township of Piscataway which prohibit the lawful business of slaughtering of animals throughout the entire Township of Piscataway, are Sections 9, 3, 5, 6, 7, and 8. Section 9 specifically provides:

> "In an Industrial District the following regulations shall apply:
>
> "A building may be erected, altered, or used, and a lot or premises may be used for any lawful purpose, except the following:
>
> "* * * slaughter of animals."

Section 3 of the ordinance divides the entire Township into 5 districts or zones, to wit: "A" Residence Districts; "B" Residence Districts; "C" Residence Districts; "Business District"; and "Industrial Districts". Section 5 provides for all uses in an "A" Residence District; Section 6 provides for all uses in a "B" Residence District; Section 7 provides for all uses in a "C" Residence District; and Section 8 provides for all uses in an "Business District". The enumerated permissible uses under Sections 5, 6, 7, and 8, do not include the business of slaughter of animals; and Section 9 expressly prohibits this lawful business in an "Industrial District". The net result is that the lawful business of slaughter of animals is prohibited throughout the entire Township of Piscataway. The zoning ordinance of the Township of Piscataway, including the foregoing references to the appropriate sections therein, is found on Page 61 of the State of Case in this action before the Court of Errors and Appeals of New Jersey. The judgment of affirmance in this action before the Court of

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Errors and Appeals was made on September 8, 1948. A petition of reargument was filed by your petitioners on September 17, 1948, with the Supreme Court of New Jersey, formerly the Court of Errors and Appeals of New Jersey, as the records of this Court indicate, and this petition for reargument was dismissed on September 27, 1948, by the Supreme Court of New Jersey.

Since the courts of New Jersey determined that your petitioners were precluded from attacking the constitutionality of the zoning ordinance because they were obliged to appeal from or otherwise review the determination of the Board of Adjustment of the Township of Piscataway on August 1, 1946, wherein the Board of Adjustment dismissed petitioners' application for a one year extension of the permit to operate their slaughterhouse, petitioners will set forth the factual situation pertinent to the proceedings before the Board of Adjustment. References hereout to the State of Case means the state of case which the Court of Errors and Appeals of New Jersey used in the determination of this action. On February 10, 1943, the Board of Adjustment of the Township of Piscataway granted a permit to Edward Geschwind to slaughter animals on petitioners' present premises in said Township for the duration and three months after cessation of hostilities of the present war (World War II) S. C. P-25. On August 14, 1945, Japan officially surrendered to the United States and its allies and hostilities then ceased. Three months thereafter was November 14, 1945, and the permit to operate the slaughterhouse terminated by the time limit therein contained. However, the Township authorities did nothing to terminate or otherwise discontinue the operation of this slaughterhouse on November 14, 1945, or at any other time until July, 1946, as hereinafter shown. On March 20, 1946, petitioners purchased the slaughterhouse, lands and premises from Edward

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Geschwind and Josephine Geschwind, his and Edward Geschwind's partner, Eugene Hoffman, for $15,000.00, solely conditioned upon the State Board of Health of New Jersey approving the transfer of the license to operate said slaughterhouse by your petitioners (S. C. P-54-58). This was consummated on or before April 11, 1946, and upon transfer of the license, your petitioners took title to the slaughterhouse and lands (S. C. P-17). On July 1, 1946, the Board of Adjustment of the Township of Piscataway, after Geschwind and Hoffman had fully withdrawn from the operation of the slaughterhouse, wrote a letter to your petitioners wherein your petitioners were notified to appear before the Board of Adjustment on July 30, 1948, at 8 P. M. to show cause why they were operating a slaughterhouse in the Township of Piscataway, and apprised petitioners of the provision in the zoning ordinance as to penalties for violation of its provisions (S. C. P-50-51). When petitioners appeared before the Board of Adjustment on July 30, 1946, they simply intended to tell the Board why they were operating a slaughterhouse but had no intention to seek a permit to operate the slaughterhouse since a slaughterhouse was totally prohibited throughout the Township and a permit or license to operate one in the Township was unobtainable. When petitioners appeared before the Board of Adjustment on July 30, 1948, and explained to the Board their predicament and their ignorance that a slaughterhouse was prohibited in the Township, the Board directed petitioners to prepare and file with the Board a letter asking for a year's extension of the permit or exception previously granted by the Board (S. C. P-20). The petitioners made such a letter (S. C. P-51). On July 30, 1946, the Board of Adjustment adopted a resolution granting to petitioners a one year extension of the permit to operate the slaughterhouse. On August 1, 1946, the Board of Adjustment again convened

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and repealed the resolution adopted by it on July 30, 1946, and approved another resolution directing petitioners to cease operation of the slaughterhouse on September 9, 1946 (S. C. P-21 & 53). Petitioners continued operation of the slaughterhouse to September 21, 1946, and were arrested and charged with a violation of Section 9 of the zoning ordinance in that on September 21, 1946, they operated their slaughterhouse in an Industrial District in the Township contrary to said ordinance (S. C. P-13). Petitioners were found guilty by Recorder Arvid Johnson of the Recorder's Court of the Township of Piscataway and sentenced to pay a fine of $25.00 each (S. C. P-66). These convictions in effect prevented the further lawful operation of the slaughterhouse which petitioners paid $15,000 to acquire. In the motion to dismiss the charges against petitioners in the Recorder's Court, their attorney stated as ground for the dismissal this:

> "Lastly, the defendants (petitioners) are engaged in a legitimate business, they had made a very substantial investment in this business, and that the ordinance in so far as it prohibits the defendants from engaging in this business at the location where the defendants carry on their business, and throughout the entire Township, is unconstitutional, in that it violates the Fourteenth Amendment of the Constitution of the United States, and deprives these defendants of their property without due process of Law" (S. C. P-36).

Upon convictions of your petitioners in the Recorder's Court of the Township of Piscataway as aforesaid, your petitioners sought a review of the validity of their convictions before Supreme Court Justice Frederic R. Colie pursuant to N. J. S. A. 2:215-7, and set forth as one of the grounds to nullify their convictions the following:

> "Said convictions are illegal because Section 9 of the zoning of the Township of Piscataway, and other pro-

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visions, therein, throughout the entire Township of Piscataway, violate the Fourteenth Amendment of the Constitution of the United States in that petitioners' property and business have been confiscated or taken away without just compensation" (S. C. P-7).

Justice Colie, in denying petitioners' petition for review of their convictions, stated:

> "As to the application to me to review the conviction under R.S.2:215-7, that matter has been adjourned sine die and we are not now concerned with it. However in order to dispose of that phase, the court, on its own motion, denies the application seeking a review before me as a single justice on the ground that Messrs. Iannella and Russo had a legal remedy which they might have pursued but did not do so and having abandoned that, they may not now come in and seek a review which turns upon the validity of the ordinance before me as a single justice" (S. C. P-69-70).

Justice Colie was referring to the statute, R. S. 40:55-46, which provides that a review of a determination of a Board of Adjustment must be done by writ of certiorari and application for the writ must be made within 30 days after "the filing of the decision in the office of the Board." This is evidence by these remarks in his opinion as follows:

> "In March 1946 Geschwind sold the business to Iannella and Russo, who applied to the Board of Adjustment for the extension of the exception, which application was denied in August, 1946, Iannella and Russo, the aggrieved persons, took no appeal from the denial or their application with the thirty days period prescribed by the statute" (S. C. P-68).

On July 1, 1947, your petitioners then obtained a writ of certiorari from the then Chief Justice Clarence R. Case of the Supreme Court of New Jersey, now the Superior Court of New Jersey, Law Division, to review the judgment of

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Justice Frederic R. Colie in dismissing petitioners' petition to review their convictions (S. C. P-2-3). Among the reasons or grounds advanced in these certiorari proceedings to set aside petitioners' convictions was as follows:

> "Said ordinance, in so far as it prohibits the business of slaughtering of animals throughout the entire Township of Piscataway, violates the Fourteenth Amendment of the Constitution of the United States because it deprives the prosecutors herein of a vested property right without due process of law" (S. C. P-72).

Petitioners further argued in their brief before the Supreme Court on the certiorari proceedings that they could not be precluded in questioning the validity of the zoning ordinance, or the constitutionality of the same because they did not appeal from or otherwise review the determination of the board of adjustment on August 1, 1946, because the Board was without jurisdiction in the matter since no five (5) days written notice was given property owners within 200 feet of petitioners' premises, as required by R. S. 40:55-44, and cited cases showing this to be a jurisdictional requirement, and also argued that the Board of Adjustment was without jurisdiction to hold a zoning ordinance unconstitutional. However, petitioners do not have either a printed copy or typewritten copy of the brief used in the Supreme Court so reference thereto can be made by page number and quotations made therefrom. The Supreme Court in disposing or dismissing petitioners' writ of certiorari stated:

> "We have carefully considered the record before us, as well as the able brief or counsel, and are of the opinion that prosecutors (petitioners) were properly denied relief in this Court. Iannella and Russo, having been denied an extension of their permit to operate the slaughterhouse on August 1, 1946, had an appropriate legal remedy which they might have pursued, namely,

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by appeal from the Board of Adjustment's denial of their application for an extension of their permit within thirty days thereafter. They chose not to do so. Instead, with full knowledge of the facts, they continued, at their peril, the operation of the slaughterhouse and as a result thereof were convicted as aforesaid.

The prerogative writ of certiorari will not lie, if the prosecutor is in laches or it has not been prosecuted with diligence. Parker *v.* Borough of Point Pleasant, et al., 11 Misc. 535, 167 A. 217*."

Your petitioners then appealed from the judgment of the Supreme Court dismissing their writ of certiorari (S. C. P-97-98) to the Court of Errors and Appeals of New Jersey, and set forth as grounds for reversal the following:

"The Supreme Court erred in dismissing prosecutors' writ of certiorari and in otherwise sustaining prosecutors' said convictions because in so far as the zoning ordinance of the Township of Piscataway prohibits throughout the entire Township of Piscataway the legitimate business of slaughtering of animals and the operation of a slaughterhouse, said ordinance violates the fourteenth amendment of the Constitution of the United States as it deprives the prosecutors herein of a vested property right to carry on a legitimate business without due process of law" (S. C. P-103-L-20-30).

Petitioners argued further:

"The Supreme Court erred in determining that prosecutors were guilty of laches and should have pursued their legal remedies by writ of certiorari, or otherwise, to review the validity and legality of the determination of the Board of Adjustment of The Township of Piscataway on August 1, 1946, wherein the Board of Adjustment denied prosecutors so called application for a one year's extension of their permit to operate a slaughterhouse and slaughter animals

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within the Township of Piscataway, and within thirty days after August 1, 1946, pursuant to the statute, and in dismissing prosecutors' writ of certiorari, because prosecutors had no permit which could be extended by the Board of Adjustment, and the Board of Adjustment was without constitutional or statutory authority to grant or disallow such a permit since the business of the prosecutors under the zoning ordinance was prohibited throughout the entire Township of Piscataway, and the said Board of Adjustment was without jurisdiction to entertain prosecutors' application since no five days' notice, or any notice whatever, was given the property owners within a radius of 200 feet from prosecutors' premises as required by R. S. 40:55-44" (S. C. 100-101).

Your petitioners further argued:

"The Supreme Court erred in dismissing prosecutors' writ of certiorari and in determining that prosecutors were guilty of laches in failing to make a timely review of the proceedings and determination of the Board of Adjustment of the Township of Piscataway on August 1, 1946, because these prosecutors were charged with the commission of a criminal or quasi-criminal acts in operating their said slaughterhouse contrary to the provisions of the zoning ordinance of the Township of Piscataway, and particularly Section 9 thereof, which said ordinance prohibited this legitimate business throughout the entire limits of the Township of Piscataway, and laches, if any, in the pursuit of a cil remedy is inapplicable to proceedings of a criminal or quasi-criminal nature so as to estop a defendant in such criminal or quasi-criminal proceedings from urging valid and legal defenses thereto, and such determination denied to these prosecutors due process of law and permitted the Township of Piscataway to do indirectly, that what it was constitutionally prohibited from doing directly, to wit: to prohibit within the limits of the Township a legitimate business" (S. C. P-101-102).

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Petitioners were unable throughout this litigation in the State Courts to have any court entertain, hear, consider and determine the question of whether or not the Board of Adjustment had any jurisdiction in this cause on its determination of August 1, 1946. Your petitioners, in their brief before the Court of Errors and Appeals, in urging the court to determine this question, stated:

> "Up to the present time, the appellants have been unable to have any judicial tribunal make a determination on whether or not the Board of Adjustment on August 1, 1946, or at all other times, had jurisdiction to entertain appellants' application for a permit as made on July 30, 1946, and which was denied by the Board of Adjustment on August 1, 1946. Both before Justice Colie and the Supreme Court, the point was raised, the facts and law in each instance were exhaustively argued and elaborated upon in the briefs that since no notice was given property owners within 200 feet of appellants' premises of the time and place where the Board of Adjustment would consider the application, all as required by R. S. 40:55-44,** the Board of Adjustment was wholly, completely, and utterly without jurisdiction to entertain said application" (Pages 14-15 of Appellants' brief).

Petitioners in their said brief cited *Hendley* v. *Ackerman*, 103 N. J. L. 305, wherein the Supreme Court stated that "It is admitted that no notice of any character was given by the Board of Adjustment of its meeting on July 15, 1926, and the return is barren of any showing that the board fixed July 15, 1926, as the time when it would hear the appeal. The Board of Adjustment was therefore utterly without jurisdiction to hear and pass upon the appeal. In such a case statutes of limitations of the character sought to be invoked (the very same statute which these appellees in this case invoke) by the respondent are ineffective and cannot be used to curtail the power of review by this Court."

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Traphagen v. *Hoboken*, 39 N. J. L. 232; aff. 40 N. J. L. 193; *Pardee* v. *Perth Amboy*, 57 N. J. L. 57; *United N. J. E. & Canal Co.* v. *Gummere*, 69 N. J. L. 111; *Bounds* v. *Chester Tp.*, 89 N. J. L. 375; The cases of *Schumacher* v. *Union City*, 9 N. J. Misc. 492, 154 A. 406, and *Somers* v. *Borough of Bradley Beach*, 115 N. J. L. 135, and *Marvin et als.* v. *Bd. of Adjustment etc., of Westfield*, 137 A. 924, were also cited (Pages 21, 7, 22 of Appellants brief). Petitioners further cited *Losick* v. *Binda*, 102 N. J. L. 157, in which the Court of Errors and Appeals held that a Board of Adjustment cannot determine constitutional questions in this language:

> "It is also urged that the application to the Supreme Court was premature, since under Acts 1924, c. 146, Sec. 9, a zoning board of appeals or, as denominated in the statute, a board of adjustment was created for the purpose of dealing with properties peculiarly situated, with reference to zoning requirements, and providing for equitable modifications in zoning regulations, where it is apparent unnecessary hardship would result to an owner, if the provisions of the ordinance were literally enforced. * * * The Board of Adjustment, as its title indicates, was created by the Act of 1924 solely for that purpose, and to serve as an appellate body for the purpose of reviewing the legal and equitable character of the inspector's act in allowing or rejecting an application for a building permit.
>
> The legal or constitutional questions involved in such a procedure, are not the subject matter for the determination of that board, but must be presented for consideration as heretofore to the proper forum". (Pages 27-28, Appellants' brief.)

Slamowitz v. *Jelleme*, 130 A. 883; *Conaway* v. *Atlantic City*, 107 N. J. L. 404; and *Redcay* v. *State Bd. of Education*, 128 N. J. L. 281, were also cited.

Petitioners cited *O'Melia Outdoor Advertising* v. *Rutherford*, 138 N. J. L. 587, 27 A. (2d) 863, *Trenton Water Power*

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Co. v. *Raff*, 36 N. J. L. 36, *Yara Engineering Corp.* v. *Newark*, 132 N. J. L. 370, 40 A. (2d) 559; *Brandon* v. *Montclair*, 124 N. J. L. 135, 11 A. (2d) 304, *Euclid, Ohio.* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016; *Nectow* v. *Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; *Mansfield & Swett, Inc.* v. *West Orange*, 120 N. J. L. 145, 198 A. 225; and numerous other cases (Pages 52 & 53 Appellants' brief) in support of its argument that the prohibition of a legitimate business throughout an entire municipality is violative of the fourteenth amendment to the Constitution of the United States as it deprives a person of his property without due process of law and denies to him the equal protection of law.

The Court of Errors and Appeals of New Jersey completely ignores petitioners' attack on the jurisdiction of the Board of Adjustment, and proceeded to a determination upon the assumption that the Board of Adjustment had jurisdiction, and thereby evaded a determination of the constitutional question, and affirmed the judgment of the Supreme Court on the opinion of the Supreme Court. Justices Heher and Burling dissented but wrote no opinion.

The determination of this case by the Court of Errors and Appeals of New Jersey based upon the opinion of the Supreme Court that petitioners were precluded from questioning the constitutionality of the zoning ordinance because they did not appeal from the determination of the Board of Adjustment within 30 days after August 1, 1946, is unsubstantial and illusory because the Court declined to determine whether or not said Board of Adjustment had jurisdiction over the cause and had it considered the jurisdiction question, then the Court would have to determine that the Board of Adjustment had no jurisdiction and the Court would then be obliged to determine the constitutional question. See *Lawrence* v. *State Tax Commission*, 286

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U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 A. L. R. 374; *Albie State Bank* v. *Weaver*, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401; and *Ancient Egyptian Arabic Order* v. *Michoux*, 279 U. S. 737, 73 L. Ed. 931, 40 S. Ct. 485. Further the determination of the Court of Errors and Appeals of New Jersey that petitioners were precluded from attacking the constitutionality of the zoning ordinance in the Recorder's Court because there petitioners failed to appeal from the determination of the Board of Adjustment on August 1, 1946, denying petitioners a one year extension of the permit to operate the slaughterhouse, when the Board of Adjustment was concededly without jurisdiction to hear and determine constitutional questions, is in itself violative of the fourteenth amendment of the Constitution of the United States.

Respectfully submitted,

(S.) EDWARD J. SANTORO,
(S.) JOHN T. KEEFE.

Dated: December 7, 1948.

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APPENDIX "A"

VINCENZO IANNELLA, ET AL., *Appellants,*

vs.

ARVID JOHNSON, ET AL., *Respondents*

On Appeal from the Supreme Court, whose opinion is reported at 136 N. J. L. 514.

Argued May 20, 1948.

Decided September 3, 1948.

For the Appellants, John T. Keefe.

For the Respondents, Maurice M. Bernstein.

PER CURIAM.

The judgment under review herein is affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Eastwood in the Supreme Court.

For Affirmance—The Chancellor, Chief Justice, Bodine, Wachenfeld, Jacobs, Wells, Dill, Freund, McLean, Schettino, JJ. 10.

For Reversal—Heher, Burling, JJ. 2.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

VINCENZO IANNELLA and FRANK S. RUSSO, *Prosecutors,*

vs.

ARVID JOHNSON, Recorder of the Township of Piscataway, and Township of Piscataway, a Municipal Corporation, *Respondents*

On Certiorari

Before Justices Dongies and Eastwood

For the Prosecutors, Edward J. Santoro (John T. Keefe, of Counsel).

For the Respondents, Maurice M. Bernstein.

The opinion of the Court was delivered by

EASTWOOD, J.

Prosecutors seek, through the medium of a writ of Certiorari, to review the legality and validity of certain sum-

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mary proceedings conducted before the respondent Arvid Johnson, Recorder of the Township of Piscataway, wherein they were convicted on or about October 8th, 1946, of violating a zoning ordinance of the Township of Piscataway. In the proceedings before the Recorder prosecutors were charged with operating a slaughter-house and the slaughter of animals thereon, on September 21st, 1946, contrary to the provisions of Section 9 of said ordinance, which prohibits throughout the entire township limits the operation of a slaughterhouse and the slaughter of animals. A brief recital of the circumstances prior to prosecutors' conviction may serve to clarify the factual situation.

In 1937, the Township of Piscataway adopted a zoning ordinance which, among other things by section 9 thereof, prohibited the use of any building or lot for the slaughter of animals in the entire township. In 1943, the Township Board of Adjustment granted on one Geschwind, the then owner of the slaughterhouse in question, a temporary extension of his permit to conduct the slaughterhouse. The extension granted to Geschwind was conditioned until the cessation of the hostilities of the war then in progress and three months thereafter. In March, 1946, the slaughterhouse business and the land on which the building was erected were sold by Geschwind to the prosecutors. They in turn applied to the Board of Adjustment for an extension of the permit to continue the slaughterhouse business. This application was denied on or about August 1st, 1946. Despite the failure of the prosecutors to secure a permit from the Board of Adjustment they nevertheless continued the operation of the slaughterhouse. The township thereupon instituted proceedings in the Recorder's Court, as a result of which prosecutors were convicted and fined $25.00 each. An application was then presented to Supreme Court Justice Frederic R. Colie for a writ of certiorari to review their conviction, which was denied by Mr. Justice Colie on the ground that prosecutors had not sought a timely review of the action of the Board of Adjustment by certiorari within the thirty days' period as set forth in R. S. 40:55-46. Iannella and Russo then applied to the Court of Chancery to restrain the Township of Piscataway from interfering

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with the operation of the slaughterhouse. While the Chancery proceedings were pending Iannella and Russo in November, 1946, again applied to Mr. Justice Colie to review the legality of their conviction in the Recorder's Court under R. S. 2:215-7. In December, 1946, these proceedings were adjourned by the Justice sine die pending the decision of the Court of Chancery. On April 8th, 1947, Vice-Chancellor Jayne continued the temporary restraint against the municipality to enable the prosecutors to litigate the matter in this court, stating:

"At the argument I conceived and expressed the idea that the validity of the ordinance should appropriately be determined at law through the avenue of certiorari."

Prosecutors accordingly then applied to Mr. Justice Colie for a writ of certiorari, or in the alternative, a rule to show cause why certiorari should not be allowed to review the legality, validity and constitutionality of the zoning ordinance of Piscataway Township, particularly section 9 prohibiting the business of slaughtering animals throughout the township. Mr. Justice Colie denied this application on the grounds that the prosecutors had a legal remedy which they might have pursued but did not do so and, having abandoned that, they were debarred from coming in and seeking a review which turns upon the validity of the ordinance before him as a single Justice, and further that prosecutors were palpably in laches. The writ of certiorari now under consideration was then allowed.

We have carefully considered the record before us, as well as the able briefs of counsel, and are of the opinion that prosecutors were properly denied any relief in this court. Iannella and Russo, having been denied an extension of their permit to operate the slaughterhouse on August 1st, 1946, had an appropriate legal remedy which they might have pursued, namely, by appeal from the Board of Adjustment's denial of their application for an extension of their permit within thirty days thereafter. They chose not to do so. Instead, with full knowledge of the facts, they continued, at their peril, the operation of the slaughterhouse and as a result thereof were convicted as aforesaid.

The prerogative writ of certiorari will not lie, if the prose-

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cutor is in laches or it has not been prosecuted with due diligence. Parker *v.* Borough of Point Pleasant, et al., 11 N. J. MIS. R. 535; 167 ATL. Rep. 217, opinion by Mr. Justice Perskie. Mr. Justice Perskie therein said:

". . . while there is no hard and fixed rule that can be laid down for a guidance on the subject-matter of laches, nevertheless, when one seeks to invoke the discretion of the court to grant the extraordinary writ of certiorari, he must prosecute his claim with due diligence."

In Home Fuel Oil Co. *v.* Glen Rock, 118 N. J. L. 340; 192 ATL. Rep. 516, a situation similar to that at bar prevailed. There, the prosecutor failed to avail itself of the statutory remedy within the statutory period following the adverse action of the Board of Adjustment and was subsequently convicted for violating the zoning ordinance. It then obtained a writ of certiorari to review the Police Court conviction. On the review it sought to question the constitutionality of the zoning ordinance and also the unreasonableness of the action of the Board of Adjustment in denying its application. Mr. Justice Perskie in affirming the judgment of conviction and dismissing the writ said:

". . . Notwithstanding the position taken by counsel for defendants, namely, that the writ does bring up the validity of the zoning ordinance, and the further fact that the allocatur was allowed, it is, nevertheless, argued for defendants that since prosecutor failed to review the action of the board of adjustment in denying its appeal, that it is now barred, in this proceeding which is to review a conviction before the recorder, from reviewing the facts and circumstances upon which the board of adjustment based its judgment. We think that the point is well taken.

"• • • Prosecutor, as already observed, properly followed that procedure to the point of an adverse determination by the board of adjustment of its appeal. It then permitted that determination to stand unchallenged. It did not exhaust the statutory provision of appeal. Prosecutor should not under these circumstances be permitted to resurrect the issues and determinations of the board of adjust-

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ment in this cause when its right to do so, in a direct attack, under the statute, has long since expired. • • •

"We are, therefore, of the opinion that the prosecutor should not be permitted to collaterally review the action of the board of adjustment in this cause. To hold otherwise would not only lead to a practice contrary to the provisions of the statute but would lead to confusion and disorder. It should not be sanctioned."

In our opinion the facts of the issue before us come well within the rule enunciated in Parker *v.* Borough of Point Pleasant, et al. and Home Fuel Oil Co. *v.* Glen Rock, and we so hold. See, also, the opinion of Chief Justice Brogan, in Crescent Hill, Inc. *v.* Allendale, 118 N. J. L. 302; 192 Atl. Rep. 514. Upon the allowance of the present writ prosecutors moved to strike respondents' inclusion in evidence of the transcript of testimony taken in the Chancery proceedings. Our determination makes it unnecessary to decide that motion.

The judgment of conviction is affirmed and the writ is dismissed, with costs.

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